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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 30

KEITH MARTIN,
Appellant,

vs.

JOSEPH S. DAVIS AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS,
Appellee.

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT.

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Appellee.

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT AS TO JURISDICTION.

Appellant appeals from a judgment of the Supreme Court of Kansas entered on December 10, 1960, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the Supreme Court of Kansas (Appendix A, *infra*, pp. A1-A20) is not yet reported. The journal entry of the Kansas District court dismissing the appellant's alternative writ of mandamus (Appendix B, *infra*, p. A21) is unreported.

BASIS OF JURISDICTION.

(i) This was an action in mandamus brought in the District Court of Johnson County, Kansas, to compel the appellee, the probate judge of Johnson County, Kansas, to permit the appellant, Keith Martin, who has been regularly admitted to practice law in Kansas, to file cases in that court and to appear and try them without the appearance or association of local counsel as required by Rules 41 and 54 of the Supreme Court of Kansas, as amended December 15, 1958.

(ii) An order was made by the Johnson County District Court on March 4, 1960, dismissing appellant's petition and alternative writ of mandamus. An appeal was taken from the ruling of March 4, 1960, to the Supreme Court of Kansas. The judgment of the Supreme Court of Kansas adverse to the appellant was entered on December 10, 1960. No motion for rehearing was filed. Notice of appeal to the Supreme Court of the United States was timely filed with the Kansas Supreme Court on December 31, 1960.

(iii) The jurisdiction of the United States to review this decision by appeal is conferred by 28 U.S.C. 1257(2). There was drawn in question the validity of amended Rules 41 and 54 of the Supreme Court of Kansas on the ground

of their being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.[1] The decision of the Supreme Court of Kansas was in favor of their validity.

(*iv*) The following decisions sustain the jurisdiction of this Court to review the judgment of the Supreme Court of Kansas: *Hamilton* v. *Regents*, 293 U.S. 245; *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Ex parte Garland*, 4 Wall. 333; *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Morey* v *Doud*, 354 U.S. 457; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389; *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522.

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1. For the purpose of conferring appellate jurisdiction on the Supreme Court of the United States, amended Rules 41 and 54 are to be treated as statutory within the meaning of 28 U.S.C. 1257(2). In *Hamilton* v. *Regents*, 293 U.S. 245, 258, it is held that "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power." The sources of the Kansas court's authority are discussed briefly in *Taylor* v. *Taylor*, 185 Kan. 324, 326, 342 P.2d 190 (1959), as follows:

> "Under the judicial power that is given to it by article 3, section 1, of our state constitution, this court has from time to time promulgated necessary rules for the examination of applicants for admission to the bar of this state (G.S. 1949, 7-103). These rules of the Supreme Court, while not statutory law, appear under G.S. 1949, 7-122, and in the forepart of certain volumes of our Kansas Reports. The latest appearance is found in 183 Kan. xi, *et seq.*, and the particular rules in question here are No. 41 and No. 54 which were amended on December 15, 1958."

The authority of the Kansas court to issue rules under the above authority is also discussed briefly in the opinion below (See Appendix A, *infra*, pp. 9-10).

QUESTION PRESENTED.

Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States, may an attorney who has been regularly admitted to practice law in the state of his residence and who has maintained an office and active practice in that state since the date of his admission, be denied, by subsequently promulgated court rules, the right to appear as counsel in the courts or before boards and commissions of that state unless he associates and has appearing with him "local counsel," as if he were a non-resident, unlicensed attorney, for the sole reason that, in addition to his practice and office in the state of his residence, he also maintains an office and practice in an adjoining state?

STATUTES INVOLVED.

The relevant provisions of the 1949 Kansas General Statutes and the Kansas Supreme Court Rules, as amended December 15, 1958, are as follows:

> Kan. G.S., 1949, 7-104. *Attorneys from other states.* Any regularly admitted practicing attorney in the courts of record of another state or territory, having professional business in the courts or before any board, department, commission or other administrative tribunal or agency, of this state, may on motion be admitted to practice for the purpose of said business only, in any of said courts, tribunals or agencies, upon taking the oath as aforesaid and upon it being made to appear by a written showing filed therein, that he has associated and personally appearing with him in the action, hearing or proceeding an attorney who is a resident of and duly and regularly admitted to practice in the courts of record of this state, upon whom serv-

ice may be had in all matters connected with said action, hearing or proceeding, with the same effect as if personally made on such foreign attorney, within this state, and such foreign attorney shall thereupon be and become subject to the order of, and amenable to disciplinary action by the courts, agencies or tribunals of this state: *Provided*, That in all actions before a court of record, said associate attorney shall be a resident of and maintain his law office within the judicial district in which said action is filed or pending. No such court, agency or tribunal shall entertain any action, matter, hearing or proceeding while the same is begun, carried on or maintained in violation of the provisions of this section: *Provided*, Nothing in this section shall be construed to prohibit any party from appearing before any of said courts, tribunals or agencies, in his own proper person and on his own behalf.

Rule No. 41. *Admission to Practice.* As soon as practicable after the completion of an examination, the board shall file a report with the clerk of the court recommending the granting of the denial of the petition of the applicant. Whenever such report shall recommend the granting of a petition, unless some reason shall appear to the contrary, the court will make an order admitting the applicant to practice in all the courts of the state, which order shall become effective upon his taking an oath in open court, the form of which shall be in substance as follows:

> You do solemnly swear that you will support and bear true allegiance to the constitution of the United States and the constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of, any falsehood in court; and that you will discharge your duties as an

attorney and counselor of the Supreme Court and all inferior courts of the state of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability, so help you, God.

Upon the making of such order the clerk shall issue to such applicant a certificate of his authority to practice law in this and all inferior courts of the state, upon his signing his name on the roll of attorneys of this court. Whenever the board shall recommend a denial of the petition, an order will be made to that effect.

Provided further however, The authority granted to practice law shall not be exercised except as provided under Rule No. 54 infra, when the licensee herein has been admitted to the Bar of another state or territory and is regularly engaged in the practice of law in such other state or territory. (Emphasis added).

(The foregoing italicized paragraph was added by amendment on December 15, 1958.)

Rule No. 54. An attorney regularly practicing outside of this state and in good standing as a member of the bar of the place of his regular practice may be recognized as an attorney by the courts, commissions, and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of record in such action or proceeding a member of the Bar of this state qualified under the provisions of G.S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record.

(Prior to its amendment on December 15, 1958, Rule 54 referred to an attorney "*residing* outside of this state in good standing as an attorney at the place of his *residence*," rather than the above. (Emphasis added.))

STATEMENT.

This matter has previously been before this Court in another context, *Taylor* v. *Taylor*, No. 552, 1959 Term, appeal dismissed, 361 U.S. 374. As background for the instant proceeding, the *Taylor* case is briefly reviewed:

On March 10, 1959, a petition for divorce was filed in the Wyandotte County District Court of Kansas by Keith Martin, a member of the Kansas Bar and appellant in the instant case, as attorney for Margaret Taylor. The defendant in that suit moved to strike the petition on the ground that Martin was a member in good standing of the Missouri Bar and regularly practiced in Missouri, and that he therefore had no authority to file such petition without the association of an attorney of record who was a member of the bar of the State of Kansas as required by amended Rules 41 and 54 of the Kansas Supreme Court. Upon Martin's failure to comply with the trial court's order that he obtain local counsel, Mrs. Taylor's petition was dismissed. Mrs. Taylor appealed to the Kansas Supreme Court contending, *inter alia*, that the application of amended Rules 41 and 54 to her attorney deprived him of due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution. The Kansas Supreme Court sustained the constitutionality of amended Rules 41 and 54 as applied to Martin, and affirmed the order of the trial court. *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190. On further appeal to this Court, the appeal was dismissed. No. 552, 1959 Term, 361 U.S. 374.

Believing that this Court may have dismissed the *Taylor* appeal because of the rule of *Tileston* v. *Ullman*, 318 U.S. 44, or because of possibilities of mootness,

Martin returned to the Kansas courts. On February 29, 1960, appellant Martin filed a petition for a writ of mandamus in the Johnson County District Court of Kansas praying that the appellee judge of the Probate Court of Johnson County, Kansas, be compelled to allow appellant to file cases in that court and to appear and try such cases without the appearance or association of local counsel and without regard to amended Rules 41 and 54 of the Supreme Court of Kansas or to Kan. G.S. 1949, 7-104, and in accordance with the license granted to him by the Kansas Supreme Court (A. 2-9)[2]. The petition further prayed that amended Rules 41 and 54 and G.S. 1949, 7-104, be declared to be in violation of the Fourteenth Amendment of the United States Constitution as applied to appellant.

Appellant's petition alleged that he had been regularly admitted to practice in the State of Kansas on February 12, 1948, and that from that date to December 15, 1958, he had regularly appeared for clients in the Probate Court of Johnson County, Kansas, without association of "local counsel." Appellant also alleged that subsequent to the promulgation of amended Rules 41 and 54 on December 15, 1958 and the decision of *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 290 (1959), discussed above, appellee judge had not allowed appellant to appear in said court without the association of "local counsel", and had informed appellant that in the future he could not appear in defendant's court for clients without the appearance and association of "local counsel."

After the district court issued an alternative writ directing appellee judge to permit appellant to appear without

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2. References to the abstract of appellant, filed with the Supreme Court of Kansas and included in the Record submitted to this Court, are designated "A."

the association of another Kansas lawyer or to show cause to the contrary, appellee filed a motion to quash the writ for the reason that neither the petition nor the writ itself stated a cause of action (A. 12). In its opinion after oral argument the district court declared that appellant's membership in the Missouri Bar and his regular practice in that state placed him squarely within the purview of amended Rules 41 and 54 requiring joinder of local counsel. The district court found that the facts relative to appellant were substantially the same as in *Taylor* v. *Taylor, supra,* and that that decision was determinative of the legal issues involved, including the constitutional questions (A. 14-16). Appellant's alternative writ was accordingly dismissed and appellant appealed.

According to the undisputed allegations of his petition, appellant was admitted to practice before the Kansas Supreme Court and all inferior courts on February 12, 1948, and is a duly licensed lawyer of the State of Kansas; he resides at 6200 West 61st Street in the City of Mission, Johnson County, Kansas. Prior to his admission he attended the public schools of Miami County, Kansas, and received his A.B. (1942) and LL.B (1947) degrees from the University of Kansas, and was elected to Phi Beta Kappa and Order of the Coif. He graduated from the Harvard Business School in September, 1946, with an M.B.A. degree. In 1943-45 he resided in Kansas City, Missouri, and was employed by the Pratt & Whitney Aircraft Corporation and attended night law school at the University of Kansas City. While attending Kansas University Law School in 1945-46 and 1946-47, he taught economics at Kansas University (A. 2-3).

Appellant was duly licensed to practice law in Missouri on August 2, 1947, and has since engaged in general practice in Missouri. He now maintains an office in the

Bryant Building, Kansas City, Jackson County, Missouri. He is a member of state and local bar associations of Missouri (A. 3-4).

Appellant has also engaged in general practice in Kansas since April, 1948, and since that date has continuously maintained an office in Mission, Kansas (a community just across the state line from Kansas City, Missouri). He has been City Attorney of Mission, Kansas, since 1951, and is a member of the State Board of Tax Appeals of Kansas. He has represented the State of Kansas in highway litigation in the Kansas courts. He wrote an article on Kansas procedure in the Third Survey of Kansas Law, 6 Kan. L. Rev. 134 (1957). He has argued cases in the Supreme Court of Kansas[3]. He is a member of state and local bar associations of Kansas (A. 3-4).

Appellant's petition further alleged that Jackson County, Missouri, and Johnson County, Kansas, in which he maintains his two offices, are contiguous counties; Wyandotte County, Kansas, is contiguous to each of the foregoing counties. The three counties are part of one metropolitan area and have a population of about one million. Appellant's clients frequently live in one county and either work or have business connections in another county and state. Their problems involve the laws and procedures of both states. His knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel

3. *State* v. *Sharp*, 174 Kan. 672, 258 P.2d 306; *State* v. *Fletcher*, 174 Kan. 530, 256 P.2d 847; *Rhea* v. *Kansas City Power & Light Co.*, 176 Kan. 674, 276 P.2d 741; *Lindbloom* v. *Lindbloom*, 177 Kan. 286, 279 P.2d 243; *State Highway Commission* v. *Abercrombie*, 185 Kan. 47, 340 P.2d 377.

and court representation. He consults with as many clients in his Kansas office or home as in his Missouri office, although most of his office work is performed in his Missouri office (A. 3-4).

Appellant's net income from his law practice exceeds $15,000 per year. Approximately one-half that sum has been earned from Kansas practice and has been so reported on his state income tax returns. A large proportion of his income is derived from court appearances including adoptions and the probate of estates of which the appellee's court has jurisdiction. Because he cannot represent clients in Kansas courts without the compulsory presence of another lawyer, clients have come to believe that he cannot counsel them regarding Kansas law or represent them in Kansas courts. He is therefore faced with the loss of a substantial portion of his income (A. 4-6).

According to the minimum fee schedules of the Johnson and Wyandotte County bar associations in Kansas, local counsel require compensation of approximately one-third to one-half of the fee for serving as local counsel. Amended Rules 41 and 54 require appellant to share his income with local counsel who frequently are not acquainted with the case in issue but are nevertheless required to be in court by the defendant because of amended Rules 41 and 54 (A. 5).

On appeal to the Supreme Court of Kansas, appellant urged that amended Rules 41 and 54 and G.S. 1949, 7-104, were in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution as applied to him. The Kansas Supreme Court rejected appellant's contention. It justified Rules 41 and 54 as applied retroactively to appellant by taking *judicial notice* of the following: that

there are six times as many lawyers practicing on the Missouri side as on the Kansas side of the Kansas City metropolitan area but that the bulk of industrial litigation occurs in Kansas courts; that difficulty has been experienced in serving process on, and securing the presence in court of, Missouri officed Kansas attorneys.[4] The court also found justification in the need for specialization. In regard to the constitutional issues the Kansas Court said:

> "We now turn to the principal question, whether Rules 41 and 54 violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contends that, as applied to him, they lack a rational connection between the grounds for 'suspension' of his license and qualifications *essential* to the practice of law, and, between the 'suspension' of his license and *any* objective the court might legitimately attain in the exercise of its power to maintain the standards of the Bar, and relies upon *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 1 L. Ed. 2d 796, 77 S. Ct. 752; *Knoigeberg* [*sic*] v. *State Bar*, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 and *In re Patterson*, 353 U.S. 952, 1 L. Ed. 2d 906, 77 S. Ct. 869. We are cognizant of what was said and held in those cases, but they do not control the question presented (Appendix A, pp. 12-13).
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> "In carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regretably, that some one of them may work a hardship on some member or group of members of the Bar. The appellant alleges such a hardship, but, as we have seen, the rules in question were directed to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is

4. As to the legitimacy of such judicial notice, see discussion *infra*, pp. 18-24.

regularly engaged in the practice of law in another state. While the police power is generally considered an exclusive power of the legislature, it may, for reasons not necessary to detail here, be exercised by the courts (*Workmen's Compensation Board* v. *Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789; *Petition of Florida State Bas Ass'n*, 40 So.2d 902).

"It is within the permissible function of the state through the supreme court to classify members of the Bar when a real, logical and substantial basis exists for the classification. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. That clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned (*Louisville & Nashville R. R.* v. *Melton*, 218 U.S. 36, 54 L. Ed. 921, 30 S. Ct. 676). * * *

"The same is true of the due process clause. The enjoyment of property is subject to the exercise by the state of the police power, and the question whether what has been done amounts to a taking of property is whether such taking was pursuant to a valid exercise of that power (12 Am. Jur., Constitutional Law, Par. 652, p. 344), or, as in the instant case, the valid exercise of inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, which is the equivalent of the police power. Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals. * * * (Appendix A, pp. 15-17).

* * *

"* * * This opinion is concluded with the observation there is no substantial and fair ground to say that the rules in question make an unreasonable and unfounded classification thereby denying to the appellant due process of law or the equal protection of the law." (Appendix A, p. 20).

THE QUESTION IS SUBSTANTIAL.

The question involved has not been passed upon by the United States Supreme Court or by any other American court. In its narrow aspect it relates to the arbitrary exclusion of an attorney from the full right to practice, but in its broader implications touches upon the freedom of the legal profession from unreasonable restrictions—a freedom which this Court proclaimed in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, in dealing with those seeking admission to the profession. The implementation of this freedom to those already admitted is imperative. The legal profession must not be left to the caprice of state action.

I. Due Process.

A. Appellant is Deprived of Substantial Interests.

Appellant Keith Martin was admitted to practice in Kansas in 1948 by an order of the Supreme Court of Kansas. This order is for life or until disbarment for cause. *Hanson* v. *Grattan*, 84 Kan. 843, 115 Pac. 646 (1911). No condition was attached to his Kansas license that he must not practice in another state, *Dyche* v. *Crawford*, 183 Kan. 141, 327 P.2d 1047 (July, 1958),[5] and he practiced in Kansas

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5. This case held that a resident lawyer who had been admitted to the Kansas Bar could not be deemed a "foreign attorney" within the meaning of Kan. G.S., 1949, 7-104 (*supra*, pp. 4-5) by reason of his having also been admitted to practice in another state. The court said:

> "It would seem clear that Section 7-104 has no application to lawyers who are admitted to the Bar of the State of Kansas.
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> * * *
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> "Certain additional qualifying words have been added to the statute in ninety years and certain additional safeguards have been added, but it remains clear that the subjects of the section are attorneys at law admitted to practice

and Missouri for ten years. By the amendment of Rules 41 and 54 in late 1958 and the decision below, the Kansas court has deemed that appellant must now be joined by "local counsel." This ruling has in effect suspended Martin's Kansas license. Henceforth he is to be treated as a "foreign lawyer" who is presumed to be incompetent in Kansas law and procedure, and who is allowed to appear in Kansas courts only if his client's interests are "safeguarded" by the presence of "local counsel." Appellant's status before the Kansas courts is therefore the same as a non-resident attorney who has not been admitted to the Kansas Bar. He is thus threatened with the loss of a practice built up through ten years of effort, and with the destruction of one-half of his income. No client will seek or retain him as counsel in a Kansas court any more; he has been declared incompetent to appear unless bolstered by local counsel. And even if a client should exist who does not object to a blemished attorney, appellant cannot afford to engage in a practice from which someone else is entitled to a large portion of the emoluments for the sole reason of his compulsory presence.

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in other States but not admitted to practice in Kansas." 183 Kan. at 443-444, 327 P.2d at 1049.

At the time of the *Dyche* case, Rule 41 did not have the final proviso that the present Rule does (*supra*, pp. 5-6), and Rule 54 was applicable exclusively to "An attorney *residing* outside of this state" rather than—as it is now—"An attorney regularly *practicing* outside of this state" (*supra*, p. 6).

After the *Dyche* decision, the Rules were amended to their present form. The Kansas Supreme Court admits in its opinion below that the "practical effect [of the amended Rules] was to extend the statute's coverage to include those members of the Kansas Bar who regularly engage in the practice of law in another state." (Appendix A, p. 12).

B. The Kansas Court's Rules Are Subject to Due Process.

The power of the Supreme Court to formulate rules in the furtherance of the administration of justice is admitted, but such power has a built-in limit consistent with reasonable and rational application. State courts are not less forbidden than legislatures by the Fourteenth Amendment to deprive persons of their substantive rights. *American Federation of Labor* v. *Swing*, 312 U.S. 321; *Shelly* v. *Kramer*, 334 U.S. 1. Because a lawyer is an officer of the court and subject to higher standards of conduct than may be expected of persons in other professions, it does not follow that he has ceased to be a "person" within the meaning of the Fourteenth Amendment or has abdicated his constitutional rights. Whatever formerly may have been thought with respect to the right to practice law, it has now been authoritatively decided by this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent* v. *West Virginia*, 129 U.S. 114. Cf. *Slochower* v. *Board of Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualifications, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law*. *Douglas* v. *Noble*, 261 U.S. 165; *Cummings* v. *Missouri*, 4 Wall. 277, 319-320. Cf. *Nebbia* v. *New York*, 291 U.S. 502." 353 U.S. at 238-239. (Emphasis added).

* * *

> "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that *a person cannot be prevented from practicing except for valid reasons.* Certainly the practice of law is not a matter of the State's grace. *Ex parte Garland*, 4 Wall. 333, 379." 353 U.S. at 239, footnote 5 (Emphasis added).

In *Schware* this Court dealt with state denial of admission to practice– ne applicant had been rejected because of failure to establish "good moral character"—here the problem is one of state exclusion from practice after admission. The principles are the same. It is inconceivable that the Fourteenth Amendment is concerned with admission to practice but is indifferent to the fate of the attorney afterward. If unreasonableness and arbitrariness are forbidden at the threshold of a legal career, as in *Schware*, when the burden of proof is on the applicant seeking admission, unreasonableness and arbitrariness are surely forbidden when the state has the burden and seeks to deprive a long-standing member of its Bar of the right fully to engage in practice. Many years ago, when the 1865 Congress sought to exclude Southern adherents from practice before federal courts, this Court said in *Ex parte Garland*, 4 Wall. 333, 379:

> "The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of

which he can only be deprived by the judgment of the court, for moral or professional delinquency."[6]

Schware and *Ex parte Garland* thus establish as to lawyers the principle which is implicit in the Fourteenth Amendment as to all persons, namely, that the state may not act arbitrarily; or, stated positively, that the means selected by the state or its agencies must have rational connection with an end the state is empowered to achieve under its police power. *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402. It is submitted that amended Rules 41 and 54 lack such necessary reasonable basis as applied to appellant Martin and that the Kansas Supreme Court has failed in sustaining the burden resting upon it of justifying the revocation of appellant's right, and of the right of all others similarly situated, to represent clients in Kansas courts.

C. The Kansas Court's Rules are Arbitrary and Unreasonable.

The Kansas Supreme Court seeks to justify amended Rules 41 and 54 in their general application and not in reference to appellant through the medium of extravagant judicial notice of facts—facts which the Court had not previously noted in *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190, when Rules 41 and 54 were under identical attack, and which had not been urged in the proceeding below by the appellee or by the bar associations. Such self-serving declarations are not self-evident truths to be taken at face value; no pronouncement of a rule making body can forestall attack

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6. It is this statement in *Ex parte Garland* to which Mr. Justice Black was no doubt referring when he cited the case in footnote 5 of the *Schware* opinion. See p. 17, *supra*, 353 U.S. at 239.

upon the constitutionality of its enactments by the opprobriousness of the epithets applied to the prohibited act. *United States* v. *Caroline Products Co.*, 304 U.S. 144. What is more significant is that the court meticulously avoids ascribing to appellant any of the faults or inadequacies which are supposed to justify amended Rules 41 and 54. His competency, conscientiousness and integrity are admitted. He is given the apology that "in carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some one of them may work a hardship on some member or group of members of the bar." (Appendix A, p. 15).

1. The Kansas court is endeavoring to set up interstate economic barriers.

The Kansas court takes judicial notice that approximately 6/7 of the 2,100 practicing attorneys in the Kansas City metropolitan area are officed on the Missouri side of the state line (Appendix A, p. 13). The court then describes in some detail the great industrial areas in Wyandotte and Johnson County, Kansas, leaving the inference that the main litigation is in those counties and not in Missouri. It seems indeed strange that 1,800 of the 2,100 practicing attorneys should be in Missouri where there is little of this industrial business, leaving Kansas without adequate counsel, especially since under the implications of Rules 41 and 54 these Missouri lawyers are getting the Kansas business and the court feels litigants should hire local Kansas lawyers.

The total lack of relevancy between a lawyer's competency to appear in court and the distribution of lawyers in relation to the quantity of litigation serves to emphasize the fact that the Kansas court is primarily

concerned in its amended Rules with the erection of barriers for the economic protection of Kansas lawyers engaged in one state practice. Yet, the United States is more than a collection of states; it is a unified nation to whose formation this Court has greatly contributed. Freedom of movement and the right of the individual to conduct affairs in several states has been zealously guarded. *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Edwards* v. *California*, 314 U.S. 160. In the latter decision the Court significantly remarked:

> "It is frequently the case that a state might gain a momentary respite from the pressure of events by the simple expedient of shutting gates to the outside world. But in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.' Baldwin v. Seelig, 294 U.S. 511, 523." 314 U.S. at 173.

2. The Kansas court ignores its own rule for service of process.

The Kansas Court purports to take judicial notice that Kansas courts have experienced difficulty in getting service of papers and motions on Kansas licensed attorneys officed in Missouri and in securing the presence of Kansas licensed attorneys officed in Missouri (Appendix A, p. 15).[7] It is strange that no allusion was made to any such difficulties in the trial court or in *Taylor* v. *Taylor*, *supra*,

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7. In the metropolitan area of Kansas City, there are approximately twenty attorneys, including Martin, who reside and practice in Kansas but who also practice in Missouri, thus engaging in a substantial bi-state practice.

and stranger yet that the statutory procedure for the service of notice[8] works satisfactorily in respect to Kansas lawyers with home and office located at points in Kansas remote from the Wyandotte and Johnson County courts, but works unsatisfactorily in respect to Kansas lawyers with home and office in Wyandotte or Johnson County who also happen to have an office in Missouri; and that telephone communication is available as to one group of lawyers but not as to another. It is wondrous that Missouri-officed Kansas lawyers as a class are more remiss than their Kansas-officed brethern in appearance in court and that this remissness can be attributed to the few extra minutes driving time by which their Missouri offices are farther from Kansas courthouses than some Kansas offices.[9]

The Court's hypothetical grounds are premised on a confusion of the "foreign attorney" without residency or office in Kansas, falling within G.S. 1949, 7-104[10] and who cannot be readily reached by process, and the Kansas attorney regularly practicing in Kansas with residence and office there who is affected by amended Rules 41 and 54 because he also practices in Missouri. Appellant

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8. G.S. 1949, 60-3824, Rule 44 of the Kansas Supreme Court, governing practice in district courts, provides:

> "Counsel filing a motion or demurrer or pleading subsequent to the petition shall, on the day the same is filed, deliver or mail a copy thereof to counsel of record for all adverse parties."

9. A lawyer in Mission, Prairie Village or Overland Park, Kansas, all in Johnson County, is closer to downtown Kansas City, Missouri, than he is to Olathe, the county seat in Johnson County. Expressways link downtown Kansas City, Missouri, with Olathe and Kansas City, Kansas, the county seat of Wyandotte County. Convenient highways and streets bind all these communities together.

10. See "Statutes Involved", *supra*, pp. 4-5.

Martin has both home and office in Kansas to which process can be mailed or served under the Kansas Court's Rule 44.[11] It is admitted that he has never failed to receive process and that no difficulty has been experienced in securing his presence in court. To require him to employ co-counsel (whose indifference to process is in fact immaterial, it being demanded only that he does not practice regularly in Missouri) is manifestly unnecessary and unreasonable. To be sure appellant may not always be in his Kansas office, but it can hardly be expected of a lawyer that in order to remain in good standing at the bar he confine himself day and night to such office. If amended Rules 41 and 54 can be applied to a resident Kansas attorney because he is absent from the state for periods of time to care for his Missouri practice, then a similar restriction can be applied to any Kansas lawyer who absents himself from the state for any reason whatever. Viewed from this logical extreme it may become risky for a Kansas lawyer to do otherwise than confine himself to perpetual seclusion in Kansas. The mere possibility that some day Martin might be unavailable is no justification for barring him from the Kansas courts unless he appears with local counsel. *Adams* v. *Tanner*, 244 U.S. 590.

3. The Kansas court erroneously believes that specialization follows state lines and not subject matter.

The Kansas court further seeks to justify amended Rules 41 and 54 upon "the consideration that in the past decade or so the manner in which law is practiced has tended to swing with emphasis to the specialist." * * * Litigation invokes statutory laws, rules of courts, and peculiarities of local practice requiring special knowledge and opinions. Such matters are best handled by a local

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11. See footnote 8, *supra*.

attorney who constantly deals with problems arising in a variety of situations. Trial work requires immediate decisions—there is little time for reflections and research. Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure." (Appendix A, p. 18).

Kansas does not have a class of barristers whose functions are clearly delineated from those of solicitors. An "office attorney" with no trial experience whatsoever is perfectly free to try any case in any Kansas court. Thus Kansas lawyers may practice before any Kansas court, whether they are familiar with local peculiarities or not, and they are not required to be joined by "local counsel." The Kansas Supreme Court appears to think that specialization depends upon state lines rather than on subject matter; *sub silentio* it assumes that the Kansas-Missouri lawyer who specializes, shall we say, in personal injury litigation knows less about the Kansas Workmen's Compensation Law and practice before the Kansas Workmen's Compensation Commission than does a lawyer practicing exclusively in Kansas who deals solely with tax matters or real estate or probate practice. The absurdity of this assumption destroys the reasonableness of the amended Rules.

The Kansas court tries to give the impression that it is striking at those who have virtually no practice in Kansas, that is "foreign attorneys" under G.S. 7-104. Yet Rules 41 and 54 are not applicable solely to "foreign attorneys" but to Kansas domiciled lawyers regularly practicing in Kansas. The latter have had experience in Kansas trial procedure and most are competent trial lawyers, as appellant admittedly is, and are far abler to represent Kansas clients than an in-

experienced Kansas office lawyer or recent graduate, either of whom will eminently qualify as "local counsel" under Rules 41 and 54. Without the trouble of investigating realities, the Kansas Supreme Court has characterized a certain group of Kansas practitioners as incompetent to appear without assistance, as "non-specialists in Kansas procedure," simply because they also practice "regularly" in Missouri. It is patently ridiculous to say that if a man devotes some time to learning Missouri practice and procedure, he is thereby rendered incompetent in Kansas procedure. The same would be true regarding federal practice or the procedures before the myriad of administrative agencies not exclusively of Kansas origin or location.

4. The amended rules are vague and uncertain.

The Kansas court does not define what it means by "regularly engaged" in out-of-state practice. Apparently the court intends to embody flexibility and latitude in Rules 41 and 54 so that they may be applied whenever a Kansas court feels that a Kansas attorney has exceeded his proper quota of out-of-state practice. A standard so vague *ipso facto* denies due process of law. *Winters* v. *New York*, 333 U.S. 507; *Musser* v. *Utah*, 333 U.S. 95. Economic vagaries and the whims of the courts are to determine whether one Missouri client or fifty makes a Kansas lawyer ignorant of Kansas law and procedure and incompetent to appear in a Kansas court without association of local counsel.

In sum, therefore, the Supreme Court of Kansas has failed to justify the imposition of its "local counsel" rule upon appellant Martin, a qualified member of its Bar who maintains an office, practices and resides in Kansas. Preventing appellant from engaging in Missouri practice certainly has no demonstrable relation to the better ad-

ministration of justice in Kansas. And no rational relation exists between amended Rules 41 and 54 and the qualifications which Kansas imposed upon appellant at the time of his admission to the Bar. *Schware* v. *Board of Bar Examiners, supra; Ex Parte Garland, supra.* Whatever may be the power of the Kansas court to attach a condition to the license of an attorney admitted after December 15, 1956, when the Rules were amended, the court cannot by its mere whim deprive a previously admitted, long-standing and qualified attorney of the fruit of years of preparation and practice.[12] As amended and applied by the Supreme Court of Kansas, Rules 41 and 54 are unreasonable and arbitrary, and deprive appellant of due process of law.

II. Equal Protection.

Amended Rules 41 and 54 deprive appellant of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause voids specious or fanciful classifications which cause some persons to be treated differently than others when they are actually similarly situated; the classification must bear a substantial relation to a legitimate objective of the State. *Morey* v. *Doud*, 354 U.S. 457; *Skinner* v. *State of Oklahoma*, 316 U.S. 535; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389. As stated by the Court in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527:

> "The State must proceed upon a rational basis and may not resort to a classification that is palpably

12. Cf. this Court's statement in *Konigsberg* v. *State Bar of California*, 353 U.S. at 257-258: "The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer." *A fortiori* the action of the Kansas court has "grave consequences" for a man in Martin's position.

> arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & E. Co. v. Coleman*, 277 U.S. 32, 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160."

The classification resulting from Rules 41 and 54 of the Kansas Supreme Court lacks any "rational basis" and is "palpably arbitrary." Appellant Martin and other Kansas attorneys similarly engaged in out-of-state practice are placed by the imposition upon them of Rules 41 and 54 into the category of "foreign attorneys" with all the disabilities attaching thereto. While they may practice outside the State, they do not differ as to legal knowledge, availability, capacity or moral qualities from Kansas attorneys with practices limited to Kansas who are not subjected to the onerous restrictions of Rules 41 and 54. A licensed Kansas attorney who also practices in another state demonstrates no absence of qualities necessary for the practice of law in Kansas and offends against no constitutionally valid policy of Kansas; this has been shown above in respect to the matter of denial of due process. By parity of reason, the fact that a Kansas attorney also practices outside the state is an insubstantial, speculative and remote basis of discrimination, and a classification resting thereon does not "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Allied Stores of Ohio* v. *Bowers, supra*. The Fourteenth Amendment guarantees not only equal protection of the laws but also the protection of equal laws. *Yick Wo.* v. *Hopkins*, 118 U.S. 356, 369; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 350.

CONCLUSION.

For the reasons stated, this Court has jurisdiction, the question presented is substantial, and probable jurisdiction should be noted.

Respectfully submitted,

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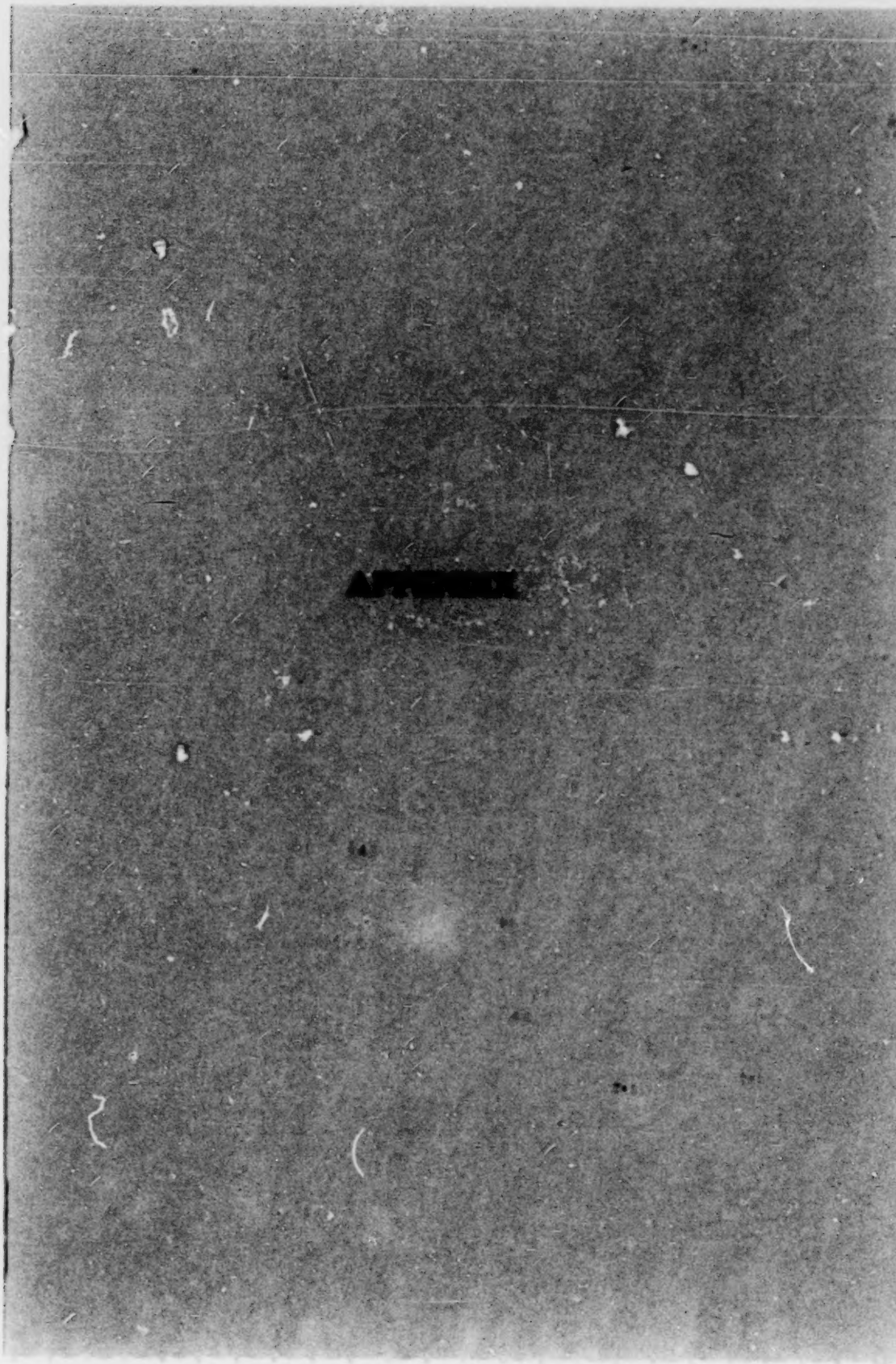

APPENDIX A.

KEITH MARTIN, *Appellant*,

v.

JOSEPH S. DAVIS AS PROBATE JUDGE OF JOHNSON COUNTY, KANSAS, *Appellee*.

Syllabus by the Court.

1.

Under Article 3, Section 1 of the Constitution of Kansas the supreme court stands at the head of the judicial department and is invested with inherent power arising from its creation, or from the fact that it is a court, which power is essential to its being and dignity, and does not require an express grant to confer it.

2.

Inherent power is not an arbitrary and despotic power to be exercised at the pleasure of the court, or because of passion, prejudice, or personal hostility; rather, it is one to be used with moderation and caution in the exercise of sound judicial discretion.

3.

The practice of the law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government.

4.

Under Article 3, Section 1 of the Constitution of Kansas, the supreme court has the inherent power to prescribe conditions for admission to the Bar, to define,

supervise, regulate and control the practice of law, whether in or out of court, and statutory regulations are effective and directory only when they accord with the inherent power of the judiciary.

5.

The supreme court's legitimate concern for maintaining high standards for the practice of the law and the administration of justice extends beyond the initial licensing of attorneys and, when admitted to the Bar, they are amenable to the rules and discipline of the court in all matters of order and procedure and to the continuing supervision and control of the practice of the law not in conflict with the federal and state constitutions.

6.

No final judgment results when the supreme court admits an applicant to the Bar of the state of Kansas; a license or privilege is merely conferred upon the applicant to engage in the practice of law subject to the conditions prescribed in paragraph 5 of the syllabus.

7.

While the police power is generally considered an exclusive power of the legislature, it may be exercised by courts.

8.

Rules 41 and 54 of the supreme court, amended December 15, 1958, providing in substance that an attorney admitted to the Bar of Kansas who has been admitted to the Bar of another state and who is regularly engaged in the practice of law in that state shall associate local counsel before he can appear in the courts or before boards or commissions of Kansas, were adopted to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a

Kansas licensed attorney who is regularly engaged in the practice of law in another state.

9.

Rules referred to in paragraph 8 of the syllabus are examined, and it is *held*: The rules are a proper and valid exercise of the inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, and, as applied to the appellant, they do not deny him due process of the law or the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, as more fully set forth in the opinion.

Appeal from Johnson district court, division No. 1; EARL E. O'CONNOR, judge. Opinion filed December 10, 1960. Affirmed.

Keith Martin, of Kansas City, Missouri, and Mission, Kansas, argued the cause *pro se*, and *Howard E. Payne*, *W. C. Jones* and *H. Thomas Payne*, of Olathe, were with him on the briefs for appellant.

John J. Gardner, County Attorney, of Olathe, argued the cause and was on the briefs for appellee.

D. B. Lang, of counsel, Bar Association of Kansas, of Scott City, *James E. Fussell*, of counsel, Leavenworth County Bar Association, of Leavenworth, and *Willard L. Phillips*, *James K. Cubbison*, *Lee E. Weeks*, *Edward M. Boddington, Sr.*, *Charles F. Williams*, *Joseph T. Carey* and *Bernard W. Alden*, all of Kansas City, were on the briefs of the Wyandotte County Bar Association as *amicus curiae*.

George A. Lowe, *Eugene T. Hackler*, *Roy S. Lowe*, *Hugh H. Kreamer* and *James H. Bradley*, of Olathe, and *Bernis G. Terry*, of Mission, were on the briefs of the Johnson County Bar Association as *amicus curiae*.

The opinion of the court was delivered by

FATZER, J.: At issue is the power of the supreme court of Kansas to control and supervise the practice of law before the courts of the state by Kansas licensed attorneys regularly engaged in the practice of law in another state.

The action was one in mandamus to compel the appellee, the probate judge of Johnson County, Kansas, to permit the plaintiff, Keith Martin, to file cases in that court and to appear and try them without the appearance or association of local counsel as required by Rules 41 and 54 of this court, amended December 15, 1958, and to declare those rules unconstitutional and void as contravening the Fourteenth Amendment to the Constitution of the United States. The district court quashed the alternative writ and the plaintiff appealed. The principal question presented was before this court in *Taylor* v. *Taylor*, 185 Kan. 324, 342 P.2d 190, certiorari denied [*sic*, appeal dismissed] 361 U.S. 374, 4 L. Ed. 2d 380, 80 S. Ct. 401, and was decided adversely to the appellant.

In the interest of brevity Rules 41 and 54, and G.S. 1949, 7-104 therein referred to, are not set forth since the portions here pertinent were quoted at length in *Taylor* v. *Taylor*, supra, pp. 326 and 327, and are incorporated in this opinion by reference. Suffice it to say those rules, as amended, provide in substance that an attorney admitted to the bar of Kansas who has been admitted to the Bar of another state and who is regularly engaged in the practice of law in that state shall associate local counsel before he can appear in the courts or before boards or commissions of Kansas. While rules of the supreme court form no part of the statutory law of the state, the revisor of statutes publishes them in the general statutes, and the

reader may find Rule 41 as G.S., 1959 Supp., 7-122, and Rule 54 as G.S., 1959 Supp., 60-3827.

The petition alleged that the appellant was graduated from the University of Kansas Law School in 1947 and almost immediately thereafter, in August, 1947, was duly licensed to practice law in the state of Missouri, and since that time has regularly practiced law and maintained his office in the Bryant Building, Kansas City, Jackson County, Missouri. On February 12, 1948, he was admitted to practice law before the supreme court of Kansas and all inferior courts, and since April, 1948, has continuously maintained an office and his residence in Mission, Johnson County, Kansas.

The appellant alleged he is engaged in the general practice of law and that his clients frequently live in one county and either work or have business connections in another county and state and that their problems involve the laws and procedures of Kansas and Missouri, and that his knowledge of the laws and procedures and his ability to practice in either state have been of assistance to him in obtaining clients and in being able to give them counsel and court representation; that he consults with as many clients in his Kansas office or home as in his Missouri office although most of his office work is performed in his Missouri office; that he has represented the State Highway Commission in litigation in Kansas courts and has tried as many litigated matters in the courts of Kansas as in Missouri; that he has also tried cases in the federal courts of each state and has argued cases in the appellate courts of each state as well as the United States Circuit Court of Appeals for the Eighth and Tenth Circuits; that since 1951 he has been attorney for the city of Mission and is presently a member of the State Board of Tax Appeals

of Kansas; that he wrote an article on Kansas Procedure published in 6 Kansas Law Review, p. 134, and that he has been and is a member of the state and local Bar associations of Kansas and Missouri.

Martin alleged that his net income from the practice of law exceeded $15,000 per year and that approximately one half of that sum has been earned in Kansas and has been so reported on his Kansas state income tax returns, that a large portion of his income is derived from his appearances in the defendant's court which has jurisdiction of adoptions and decedents' estates; that the minimum fee schedules of the Johnson and Wyandotte County Bar Associations require that local counsel be compensated approximately one-third to one-half of the fee for the particular litigation; that prior to the amending of Rules 41 and 54 and the decision in the Taylor case, *supra*, he regularly appeared for clients without the appearance and association of local counsel but that subsequent thereto the defendant has not allowed him to appear and try cases in the probate court of Johnson County unless he has local counsel associated with him, and the defendant has informed him that in the future he cannot appear as attorney for clients without the appearance and association of local counsel as required by Rules 41 and 54.

Martin alleged that Rules 41 and 54 are vague, arbitrary and without standards and have caused his Kansas license to be in fact a nullity as long as he practices law "regularly" in Missouri; that those rules not only deprive him of part of his income from his Kansas practice but also discourage clients from seeking his services; that because he cannot represent them in Kansas courts without the appearance of another lawyer, they have come to believe he cannot counsel them regarding Kansas law or represent them in Kansas courts; that the amended rules place him

in the category of a foreign attorney as referred to in G.S. 1949, 7-104, and render his Kansas license inoperative so long as he "regularly" practices in Missouri unless he has another Kansas lawyer associated and appearing with him; that he has continuously listed and maintained telephones in his offices in Kansas and Missouri and his residence, and that since 1948 Kansas lawyers have obtained service of pleadings upon him by mailing them to his Kansas office or residence or have left them at either place.

Martin alleged that the amended rules deny him due process and equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and that unless the defendant allows him to appear in the probate court of Johnson County in all cases now pending and all future cases without the appearance and association of local counsel he will lose clients and a substantial part of his income and will be deprived of the right to practice his profession in the defendant's court. Further, that his Kansas license granted him the right to appear in the supreme court and in all inferior courts including the court presided over by the defendant.

Martin further alleged that he had no adequate remedy at law; that as a matter of right he was entitled to file cases in the defendant's court and try them without appearance and association of local counsel; that he has suffered and will suffer irreparable injury if the defendant is not compelled to permit him to file and try lawsuits without appearance and association of local counsel. The prayer was that the relief sought be granted and that amended Rules 41 and 54 and G.S. 1949, 7-104 be declared unconstitutional and void.

The defendant, appearing by the county attorney of Johnson County, filed a motion to quash the alternative writ upon the ground that neither the writ nor the petition alleged facts showing that Martin was entitled to the relief sought.

Prior to hearing the matter, the Johnson County Bar Association filed an application to intervene as *amicus curiae* upon the ground that the questions raised were of interest and concern to that association and it was granted leave to file such pleadings as it deemed proper. The committee on Unauthorized Practice of the Law of the Wyandotte County Bar Association made no application to enter the case as *amicus curiae*, but did appear and offered assistance to the county attorney in the trial of the matter.

The district court sustained the defendant's motion to quash the alternative writ, and Martin duly perfected this appeal.

Before discussing the legal questions here presented it should be noted that during the pendency of this appeal the committee on Unauthorized Practice of the Law of the Wyandotte County Bar Association made application and was granted leave to file its brief as *amicus curiae* in support of the district court's judgment. The Leavenworth County Bar Association and the Bar Association of the State of Kansas joined in that brief. Likewise, the committee on Unauthorized Practice of the Law of the Johnson County Bar Association asked for and was granted leave to file its brief as *amicus curiae* for the same purpose.

When this case was heard on the merits, the appellant argued that this court does not have power to adopt rules relating to the admission of applicants to the Bar, or to regulate and control the practice of law by attorneys

previously admitted, hence, Rules 41 and 54 are ineffective and meaningless. The contention is without merit. The constitution of Kansas distinctly distributes the powers of the government to the executive, legislative and judicial departments. Under Article 3, Section 1 the judicial power is vested in a supreme court, district courts, probate courts, justice of the peace, and such other courts, inferior to the supreme court, as may be provided by law. Under that provision of the constitution, the supreme court stands at the head of the judicial department (*Householder* v. *Morrill*, 55 Kan. 317, 40 P. 664) and is invested with inherent power arising from its creation, or from the fact that it is a court. Inherent power is essential to its being and dignity, and does not require an express grant to confer it (*Petition of Florida State Bar Ass'n*, 40 So.2d 902). It is not an arbitrary and despotic power to be exercised at the pleasure of the court, or because of passion, prejudice or personal hostility; rather, it is one to be used with moderation and caution in the exercise of sound judicial discretion (7 C.J.S., Attorney and Client, Par. 13, p. 729).

It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government (*In re Integration of Nebraska State Bar Ass'n*, 133 Nebr. 283, 275 N.W. 265, 114 A.L.R. 151). Included in that power is the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise

of its police power to protect the public interest and welfare (*The People* v. *Goodman*, 366 Ill. 346, 8 N.E.2d 941, 111 A.L.R. 1; *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604, 151 A.L.R. 586; 5 Am. Jur., Attorneys at Law, Par. 2). It follows that the power of the supreme court to make reasonable rules for those purposes is not open to question (*Peyton's Appeal*, 12 Kan. 398; *Farlin* v. *Sook*, 30 Kan. 401, 1 P. 123; *In re Smith*, 73 Kan. 743, 85 P. 584; *In re Wilson*, 79 Kan. 450, 100 P. 75; *In re Gorsuch*, 113 Kan. 380, 214 P. 794; *In re Hanson*, 134 Kan. 165, 5 P.2d 1088; *State, ex rel.*, v. *Perkins*, 138 Kan. 899, 28 P.2d 765; *Depew* v. *Wichita Association of Credit Men*, 142 Kan. 403, 49 P.2d 1041; *State, ex rel.*, v. *Schmitt*, 174 Kan. 581, 258 P.2d 228; *Taylor* v. *Taylor*, *supra*).

The appellant next contends that when he was admitted to the Bar of this court in 1948 Rules 41 and 54 did not require him to associate local counsel as a condition to his appearance in courts of the state, and argues that the amendments in December 1958 operate to suspend his right to practice law in Kansas because he regularly practices in another state. He further contends that the court's order admitting him to practice was a final judgment and conditions not a part of that judgment cannot be subsequently imposed. The contentions lack substance. Attorneys at law are a specially qualified class of persons for the purpose of assisting the state and its tribunals to administer justice. While they do not hold an office or public trust in a constitutional or statutory sense, they are, because of their close intimate relationship to the courts, an important part of the judicial system of the state and are "officers of the court" (*In re Gorsuch*, supra; *In re Hanson*, supra; *State, ex rel.* v. *Perkins*, supra; *Depew* v. *Wichita Association of Credit Men*, supra). Although G.S. 1949, 7-102 provides who may be admitted

to practice in all the courts of the state upon taking the oath prescribed, the statutory regulation is effective and directory only when it accords with the inherent power of the judiciary because the licensees are officers of the court (*Depew* v. *Wichita Association of Credit Men*, supra, p. 406).

The supreme court's legitimate concern for maintaining high standards for the practice of the law and the administration of justice extends beyond the initial licensing of attorneys. Without the power of supervision and control, the initial examination would afford little, if any, opportunity to determine the continuing qualifications of attorneys practicing before it and the inferior courts of the state, or when the privilege of practicing law has been forfeited. When admitted to the Bar, attorneys at law become amenable to the rules and discipline of the court in all matters of order and procedure and to the supervision and control of the practice of law not in conflict with the constitution. Since the rules in question operate uniformly upon all members of the Bar from the time of their adoption, the appellant, like all other attorneys who become subject to their provisions, was bound to comply with them in his practice of the law in this state. Moreover, no final judgment resulted when he was admitted to the Bar—a license or privilege was merely conferred upon him to engage in the practice of law (*In re Casebier*, 129 Kan. 853, 855, 284 P. 611; *In re Hanson*, supra) for the term of his life or until disbarred by a court of competent jurisdiction (*Hanson* v. *Grattan*, 84 Kan. 843, 115 P. 646). The practice of the law has been defined in *State, ex rel.* v. *Perkins*, supra, and *Depew* v. *Wichita Association of Credit Men*, supra, p. 408, and both cases recognize that it does not only include appearances in court on litigated matters, but covers

services rendered to a client in advising him of his rights. See, also, *State ex rel.* v. *Schmitt*, supra, p. 588. Hence the appellant, although he regularly practices law in Missouri, is not prohibited from practicing law in Kansas by counseling and advising his clients, or preparing documents requiring knowledge of legal principles not possessed by a layman, or of advising the city officials, as city attorney. Neither is he prohibited from practicing before the courts and tribunals of this state whenever he wishes—he has only to comply with the condition imposed of associating with local counsel. In *Taylor* v. *Taylor*, supra, it was said:

> "* * * Martin's license to practice law before the courts of the state of Kansas has not been in dispute nor has he been disbarred * * *." (l.c. 328.)

Clearly, Rules 41 and 54 do not revoke or suspend the appellant's license or right to practice law in this state, nor did they change the provisions of the statutory law (G.S. 1949, 7-104); their practical effect was to extend the statute's coverage to include those members of the Kansas Bar who regularly engage in the practice of law in another state.

We now turn to the principal question, whether Rules 41 and 54 violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The appellant contends that, as applied to him, they lack a rational connection between the grounds for "suspension" of his license and qualifications *essential* to the practice of law, and, between the "suspension" of his license and *any* objective the court might legitimately attain in the exercise of its power to maintain the standards of the Bar, and relies upon *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 1 L.Ed. 2d

796, 77 S.Ct. 752; *Knoigsberg* [*sic*] v. *State Bar*, 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 722 and *In re Patterson*, 353 U.S. 952, 1 L.Ed. 2d 906, 77 S.Ct. 869. We are cognizant of what was said and held in those cases, but they do not control the question presented.

When this court adopted the amendments to Rules 41 and 54 it was aware of and took judicial notice of the following: Wyandotte and Johnson Counties in Kansas lie along the state line opposite Jackson County, Missouri, and contain a combined area aproximately equal to that of Jackson County. Wyandotte County ranks second in population in Kansas and Johnson County ranks fourth. Those three counties, Jackson, Wyandotte and Johnson, make up the greater part of one metropolitan area which has a population of about one million. The largest of the downtown areas of the Kansas Cities is in Missouri where approximately 2100 practicing attorneys maintain their offices. Of that number, an estimated 300 are Kansas licensed attorneys who reside in Kansas but who regularly practice in Missouri. Some of them, however, maintain an individual part-time practice in Johnson and Wyandotte Counties, are listed in the telephone directory, and, like the appellant, have their names on office doors of, and share office space with, accountants, architects, dentists and real estate brokers. There are approximately 200 active resident practicing attorneys maintaining offices in Wyandotte County and approximately 90 active resident practicing attorneys maintaining offices in Johnson County. Thus, the largest number of practicing attorneys—seven to one—are officed on the Missouri side.

On the Kansas side, in the diked bottom land lying along the Kansas and Missouri Rivers, are located the large industrial areas which include all of the large packing plants, stockyards, a Fiberglass industry, an oil refinery, a

motor assembly plant, and many other hazardous industries. Accordingly, a greater number of accidents in the workmen's compensation and personal injury field occur in Kansas. Litigation arising from those accidents is controlled by Kansas law and falls within the jurisdiction of the Kansas courts.

In the workmen's compensation field alone the volume of business conducted by the courts and commissions in Wyandotte and Johnson Counties runs on a weekly average of 80 to 100 cases, with approximately 40 to 50 percent represented by Kansas City, Missouri, atorneys having local Kansas counsel associated with them. In addition to workmen's compensation cases, Wyandotte County, with four divisions of its district court at Kansas City, Kansas, had an average case load of 2500 to 2600 civil and 350 to 400 criminal cases per year. Its city court, with two divisions, had a case load of approximately 3900 civil cases and from 900 to 950 preliminary hearings in criminal cases per year, including misdemeanors. Its probate court had an extremely heavy docket of proceedings relating to decedents' estates as well as many guardianship cases, and it also had an extensive case load in its juvenile division. The Johnson County District Court, with four divisions at Olathe, had an average case load of approximately 900 to 1000 civil and approximately 100 criminal cases per year. Like Wyandotte County, its probate court had an extensive case load of decedents' estates as well as guardianship proceedings and other matters, and its magistrate court handled in excess of 1000 cases per year.

In the main, that litigation was handled by attorneys falling within four distinct categories: resident Missouri attorneys who associated local Kansas counsel as required by G.S. 1949, 7-104; resident Kansas attorneys maintain-

ing offices in Wyandotte and Johnson Counties; resident Kansas attorneys regularly practicing in Missouri who associated local Kansas counsel, and resident Kansas attorneys who maintained a part-time practice in Kansas but who regularly practiced law and maintained their principal offices in Missouri.

From the totality of the foregoing, Kansas courts and commissions encountered difficulty in procuring the presence of the Kansas licensed attorneys officed in Missouri at the call of the court's and the commission's dockets; in the inability of Kansas officed attorneys to procure service on Missouri officed Kansas attorneys without having to proceed to another state; in the failure of some Kansas licensed attorneys officed in Missouri to answer calls to appear on matters of urgency, and in the failure of those attorneys to familiarize themselves with the rules of local practice and procedure by reason of their infrequent appearance before the courts and tribunals. Altogether too frequently, the courts were faced with the necessity of deciding a case on some technicality caused by the violation of rules established for the practice before the Kansas courts and commissions and because of conflicting statutory provisions between the states of Kansas and Missouri with respect to different periods of general statute limitations (Missouri Revised Statutes 516.110, Par. 1, *et seq*; G.S. 1949, 60-306) and limitations relating to master and servant (see, generally, Missouri Revised Statutes, 287.430; G.S. 1959 Supp., 44-520a).

In carrying out its duty of supervising the actions of its officers, the supreme court cannot always formulate rules without the possibility, regrettably, that some one of them may work a hardship on some member or group of members of the Bar. The appellant alleges such a hardship, but, as we have seen, the rules in question were

directed to serve the public policy of the state in all phases of actions, hearings and proceedings where the applicant or litigant is represented by a Kansas licensed attorney who is regularly engaged in the practice of law in another state. While the police power is generally considered an exclusive power of the legislature, it may, for reasons not necessary to detail here, be exercised by the courts (*Workmen's Compensation Board* v. *Abbott*, 212 Ky. 123, 278 S.W. 533, 47 A.L.R. 789; *Petition of Florida State Bar Ass'n*, 40 So. 2d 902).

It is within the permissible function of the state through the supreme court to classify members of the Bar when a real, logical and substantial basis exists for the classification. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. That clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned (*Louisville & Nashville R.R.* v. *Melton*, 218 U.S. 36, 54 L.Ed. 921, 30 S.Ct. 676). There is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 294, 42 L.Ed. 1037, 18 S.Ct. 594). A state has a wide range of discretion in distinguishing; selecting and classifying, and it has been held that it was sufficient to satisfy the demand of the Constitution of the United States if a classification was practical and not palpably arbitrary (*Orient Insurance Company* v. *Daggs*, 172 U.S. 557, 43 L.Ed. 552, 19 S.Ct. 281).

The same is true of the due process clause. The enjoyment of property is subject to the exercise by the state

of the police power, and the question whether what has been done amounts to a taking of property is whether such taking was pursuant to a valid exercise of that power (12 Am.Jur., Constitutional Law, Par. 652, p. 344), or, as in the instant case, the valid exercise of inherent power of the supreme court to regulate, supervise and control the practice of law before the courts of the state, which is the equivalent of the police power. Regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property, or will result in a loss to individuals. The infliction of such loss is not a deprivation of property without due process of law—the exertion of the police power upon objects lying within its scope in a proper and lawful manner is due process of law. Hence, the police power may be exerted as a restraint upon private rights of persons or to regulate the use of property, and where appropriate or necessary, prohibit the use of property for certain purposes in aid of the public safety and general walfare, and constitutional limitations form no impediment to its exercise where the regulation is reasonable and bears a fair relationship to the object sought to be attained (*Schaake* v. *Dolley*, 85 Kan. 598, 118 P. 80, 27 L.R.A. (NS) 877; *Dey* v. *Knights & Ladies of Security*, 113 Kan. 86, 213 P. 1066; *McNaughton* v. *Johnson*, 242 U.S. 344, 61 L.Ed. 352, 37 S.Ct. 178; *State* v. *Mugler*, 29 Kan. 252, 123 U.S. 623, 31 L.Ed. 205, 8 S.Ct. 273; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337; *Armour & Co.* v. *North Dakota*, 240 U.S. 510, 60 L.Ed. 771, 36 S. Ct. 440).

When those general principles are applied to the appellant's argument that the classification made is arbitrary, without standard and unreasonable, we think they are decisive against the contention. The classification encompasses members of the Kansas Bar regularly en-

gaged in the practice of law in another state, and is a natural one. The difference between that group of attorneys, who are required to associate local counsel, and resident members of the Kansas Bar, who are not so required, rests upon a consideration which is real as distinguished from one which is fanciful, and has a direct and substantial relation to the object to be attained--the removal of obstacles to a greater public welfare, that is, delays in the orderly administration of justice by Kansas courts and commissions, and, also, to provide litigants in those tribunals with the service of a resident attorney familiar with local rules, procedure and practice and upon whom service may be had in all matters connected with actions or proceedings proper to be served upon an attorney of record.

We think the classification is further justified upon the consideration that in the past decade or so the manner in which law is practiced has tended to swing with emphasis to the specialist. There has developed much new and complex law which has had and will continue to have a profound effect upon the general practice of the law. Those complexities have led to Trial Lawyers versus Office Lawyers; the development of law firms by congregation of specialists; the use of lawyers in trust and title companies, and strong corporate legal departments. Litigation invokes statutory laws, rules of courts, and peculiarities of local practice requiring special knowledge and opinions. Such matters are best handled by a local attorney who constantly deals with problems arising in a variety of situations. Trial work requires immediate decisions—there is little time for reflections and research. Only the lawyer with considerable experience in a particular forum can adequately and consistently render high-level service in the area of local procedure. It is highly desirable that

the legal profession recognize those developments, understand them, and adjust as needed so the public will be adequately protected and the profession strengthened and not weakened.

While the appellant alleges a loss of income as a result of the rules and also that they have discouraged clients from seeking his services because they have come to believe he cannot counsel them or represent them in Kansas courts, nonetheless his regular practice of the law in Missouri has placed him within the classification provided and he is in the group by his own selection and volition. He has not been singled out or made an example of (*Taylor* v. *Taylor*, supra, p. 328), nor has he been discriminated against. He is not the only Kansas licensed attorney affected—any member of the Kansas Bar who, like the appellant, regularly engages in the practice of law in another state is bound to comply with the rules. Neither does the fact that his home is in Kansas where he keeps the Kansas reports; that he shares office space with an accountant where he keeps the general statutes of Kansas; that he has attained high scholastic achievements; that he is the author of an article on Kansas procedure, and is a respected member of the Local and State Bar Associations lessen the binding effect of the rules as applied to him. Looking at all the circumstances that attend, we cannot say that the object sought to be accomplished by the rules presents a clear, unmistakable infringement of the appellant's rights secured by the fundamental law (*Murphy* v. *California*, 225 U.S. 623, 56 L. Ed. 1229, 32 S. Ct. 697, 41 L.R.A. (NS) 153).

During the pendency of this appeal the appellant made application to file the same brief as he filed as counsel for the appellant in the Taylor case, *supra*, which was allowed. The same point of law presented in that appeal

is presented and reargued here, the only difference being that in the instant appeal the appellant was the plaintiff below. It was held in the Taylor case that he was not denied due process of law or the equal protection of the law, and we reaffirm that holding. This opinion is concluded with the observation there is no substantial and fair ground to say that the rules in question make an unreasonable and unfounded classification thereby denying to the appellant due process of law or the equal protection of the law.

The judgment is affirmed.

APPENDIX B.

Journal Entry.

On this fourth day of March, 1960, the motion of the defendant to quash the alternative writ of mandamus comes on regularly for hearing. The parties appear in person and by their attorneys of record. Roy S. Lowe appears for the Committee on Unauthorized Practice of the Johnson County Bar Association as *amicus curiae*. Bernhard W. Alden is present for the Wyandotte County Bar Association.

Thereupon, arguments are heard by counsel of record and the court, after having duly considered the same, finds that the motion to quash should be sustained.

It Is, Therefore, Ordered that defendant's motion to quash the alternative writ of mandamus be and the same is hereby sustained and the plaintiff's petition and alternative writ is dismissed and the costs are assessed against plaintiff.